IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

TY CLEVENGER,

Plaintiff,

vs.

GREGORY P. DRESSER, STACIA L. JOHNS, KIMBERLY G. KASRELIOVICH and THE STATE BAR OF CALIFORNIA

Defendants

Case No. 3:17-cv-2798

PLAINTIFF'S REQUEST FOR A TEMPORARY RESTRAINING ORDER and PRELIMINARY INJUNCTION

NOW COMES Ty Clevenger, the Plaintiff, moving the Court to grant a temporary restraining order and preliminary injunction for the reasons set forth below:

Introduction

The Plaintiff is a blogger and an inactive member of the State Bar of California ("California Bar" or "Bar"). *See* Declaration of Ty Clevenger (Exhibit 1). Beginning on May 9, 2016, the Plaintiff blogged about a state bar prosecutor, Cydney Batchelor, who withheld exculpatory evidence in a state bar proceeding. *See* "State bar prosecutor who investigated prosecutorial misconduct is accused of prosecutorial misconduct," http://lawflog.com/?p=1185 (Exhibit 2). According to a witness, Ms. Batchelor contacted him and he provided exculpatory evidence, but she repeatedly told him that she was not going to document their conversation and he "should forget the phone call ever happened." *Id*.; *see also* Declaration of Jason L. Yearout (Exhibit 3). Sure enough, Ms. Batchelor never disclosed the information to the respondent whom she was prosecuting, and the witness (an Alabama attorney) was so troubled by his conversation with Ms. Batchelor that he contacted the respondent directly. *Id*.; *see* Wade Robertson's Motion to Dismiss for Fraud on the Court by State Bar (Exhibit 4) and internal

exhibits. When confronted with this, Ms. Batchelor did not deny her conversation with the exculpatory witness, nor did she deny that she told him that he "should forget the phone call ever happened." *See* "State bar prosecutor implicates herself in crime," http://lawflog.com/?p=1221 (Exhibit 5) and Declaration of Cydney Batchelor (Exhibit 5a). Likewise, she could not deny the fact that she withheld the exculpatory evidence.

Ironically, Ms. Batchelor had made a name for herself by prosecuting district attorneys and their deputies for withholding exculpatory evidence, *see* Diane Curtis, "Bar responds to Innocence Project report," *California Bar Journal*, November 2010, http://www.calbarjournal.com/November2010/TopHeadlines/TH5.aspx, and the Plaintiff noted that irony on his blog. *See* http://lawflog.com/?p=1185 (Exhibit 2). The Plaintiff further noted that Ms. Batchelor appeared to have committed a crime under California law, *see* http://lawflog.com/?p=1221 (Exhibit 5), and the Plaintiff filed a grievance against her and requested appointment of special counsel. *See* May 9, 2016 letter from Ty Clevenger to Trustees of the California Bar (Exhibit 6). Rather than refer the grievance to an outside prosecutor, however, the California Bar whitewashed the incident and dismissed the grievance without an investigation. *See* May 31, 2016 letter from Donald Steedman to Ty Clevenger (Exhibit 7).

The Plaintiff publicly criticized the cover-up in a June 14, 2016 blog post, *see* "California Bar blocks investigation of internal misconduct," http://lawflog.com/?p=1228 (Exhibit 8), and he emailed that blog post to the officers and directors of the California Bar with the following comment: "I'm wondering how long you guys think you can keep sweeping this under the rug." *See* June 14, 2016 Email from Ty Clevenger to California Bar Trustees (Exhibit 9). The California Bar retaliated on April 5, 2017, when it notified the Plaintiff that it intended to seek his disbarment for incidents that the Bar had known about for more than four years, *see* April 5, 2017 letter from Stacia Johns to Ty Clevenger (Exhibit 10), even though (1) the Plaintiff has not

practiced in California nor been an active member for years, and (2) the jurisdictions where the Plaintiff actually practices did not seek disbarment for those incidents.

The California Bar has been mired in corruption and scandal for years, and it is financially insolvent. *See, e.g.*, Michael Hiltzik, "The California State Bar's dismal history shows why it should be broken up," *Los Angeles Times*, June 14, 2016 http://www.latimes.com/business/hiltzik/la-fi-hiltzik-calbar-20160619-snap-story.html and Matt Hamilton, "Audit rips California's state bar for shady finances and bloated salaries," *Los Angeles Times*, May 13, 2016 http://www.latimes.com/local/lanow/la-me-ln-state-bar-audit-20160513-snap-story.html. The Plaintiff is reliably informed that the California Bar has hundreds of millions of dollars worth of unfunded pension liabilities, and the Plaintiff will show that the bar uses disciplinary proceedings as a means of generating money to fund itself and to fund the California State Bar Courts.[1] In particular, the Plaitiff will show that the California Bar uses its "court" system to levy fines, damages, and attorney fees for the purpose of funding itself and its employees. Accordingly, both the prosecutors and the judges have a strong financial incentive to seek and impose discipline against attorneys, regardless of the merits.

As explained below, the California Bar's proposed charges against the Plaintiff arise entirely from the results of the disciplinary proceedings in Texas and D.C., and the Texas and D.C. cases resulted from the same underlying facts. Texas only reprimanded the Plaintiff, but that apparently was not good enough for the D.C. court, which ultimately suspended the Plaintiff. Now California wants to take things yet another step further and disbar the Plaintiff, even though the Plaintiff is not alleged to have committed any new misconduct since the Texas disciplinary case was filed in early 2013. The Plaintiff defies the California Bar to identify another case in which it sought to disbar an inactive member on the basis of lesser punishments imposed by other jurisdictions where the attorney actually practiced (and where the alleged misconduct

[1] The Plaintiff incorporates by reference the pleadings and exhibits in *Wade Anthony Robertson v. Richard A. Honn, et al.*, Case No. 17-cv-01724 (N.D. Cal.), as if fully set forth herein.

actually occurred). The Plaintiff asks the Court to temporarily restrain and preliminarily enjoin the California Bar from retaliating against him.

Facts

In 2012, an attorney in Texas filed a bar grievance against the Plaintiff based on sanctions imposed on the Plaintiff by federal judges in Waco, Texas and Washington, D.C. *See* Declaration of Ty Clevenger (Exhibit 1). In response, the Plaintiff *encouraged* the State Bar of Texas's Office of Chief Disciplinary Counsel to file charges against him so he could conduct discovery and expose the corruption and misconduct that led to the sanctions. *Id*. On April 11, 2013, the Texas Bar filed formal charges. *See* Original Disciplinary Petition (Exhibit 11). The federal judges in Texas and D.C. had accused the Plaintiff of filing frivolous lawsuits and multiplying proceedings, *id*. (citing federal courts), but those findings could be challenged before a jury under Texas law, *see Neely v. Comm'n for Lawyer Discipline*, 976 S.W.2d 824 (Tex.App. – Houston [1st Dist.] 1998, no pet.), so the Plaintiff demanded a jury trial and set about conducting discovery in the disciplinary case. *See* Declaration of Ty Clevenger (Exhibit 1).

The Plaintiff obtained evidence of gross misconduct by officers of the court in the D.C. proceedings (including *ex parte* communications with a presiding judge), and as a result Texas bar prosecutor Dirrell S. Jones dismissed all claims related to the D.C. proceedings. *See* Pleadings and exhibits in *Wade Anthony Robertson v. Richard A. Honn, et al.*, Case No. 17-cv-01724 (N.D. Cal.) and March 25, 2014 Settlement Agreement (Exhibit 12), and *compare* Original Disciplinary Petition (Exhibit 11) *with* Second Amended Disciplinary Petition (Exhibit 13). Mr. Jones further dismissed the allegations that the Plaintiff filed frivolous claims before U.S. District Judge Walter S. Smith, Jr. in Waco, *id.*, because the Plaintiff obtained proof that two attorney defendants had, in fact, perpetrated a seven-figure real estate fraud just as the Plaintiff had alleged. *See* Transcript of Deposition of James H. McCullough (Exhibit 14). Specifically, the Plaintiff obtained a transcript wherein one of the attorney defendants had

implicated himself in the fraud, *id*., ergo the pleadings were not frivolous as Judge Smith had alleged.

The only remaining issue in the Texas Bar case was whether the Plaintiff multiplied proceedings before Judge Smith in *Erwin v. Russ*, Case No. 6:09-cv-00127 (W.D. Tex.)("*Erwin I*") and a related case in Houston (*Erwin II*). In early 2014, the Plaintiff and Mr. Jones agreed to mediation, and Mr. Jones informed the Plaintiff that he wanted to settle the case against the Plaintiff so he could pursue charges against the attorney defendants in *Erwin I* and *Erwin II*. *Id*. The Plaintiff did not admit any wrongdoing, but he nonetheless agreed to accept a reprimand for multiplying proceedings in *Erwin I* and *Erwin II*. *See* Settlement Agreement (Exhibit 12).

In September of 2014, the Plaintiff launched a website about misconduct in the federal cases in Waco, Texas and Washington, D.C. *See* Declaration of Ty Clevenger (Exhibit 1). Patrick Kearney, one of the attorneys who tampered with evidence in the D.C. case (and communicated *ex parte* with the presiding judge), then filed a misconduct complaint against the Plaintiff with the U.S. District Court for the District of Columbia's Committee on Grievances, and Mr. Kearney referenced the Plaintiff's website in support of the complaint. *See* December 29, 2014 letter from Patrick Kearney to Committee on Grievances (Exhibit 15). Shortly thereafter, the Plaintiff filed a misconduct complaint against Mr. Kearney and his co-counsel for forgery, evidence tampering, subornation of perjury, and *ex parte* communications with the presiding judge. *See* January 24, 2015 letter from Ty Clevenger to Committee on Grievances (Exhibit 16). The Committee on Grievances did not investigate, and the grievances remain in limbo to this day. *See* Declaration of Ty Clevenger (Exhibit 1). Conversely, the committee filed charges seeking the disbarment of the Plaintiff. *Id*.[2]

[2] Mr. Kearney filed an identical complaint against the Plaintiff with the U.S. Court of Appeals for the D.C. Circuit. *See* Declaration of Ty Clevenger (Exhibit 1). The D.C. Circuit had previously censured the Plaintiff, *see* May 16, 2014 Order (Exhibit 17), and that fact was made known to the Texas Bar prior to settlement. *See* February 25, 2013 letter from Ty Clevenger to Dirrell S. Jones (Exhibit 18). The circuit court dismissed the grievance filed by Mr. Kearney, whereas the district court sought disbarment. *See* Declaration of Ty Clevenger (Exhibit 1).

The Plaintiff alleged selective prosecution and First Amendment retaliation in the D.C. disciplinary proceeding, and he further pointed out that Texas had dismissed all charges related to the D.C. sanctions after the Plaintiff presented evidence of gross misconduct in those proceedings. *See* Motion to Dismiss (Exhibit 19) and Supplemental Motion to Dismiss (Exhibit 20). The D.C. court nonetheless refused to permit discovery, refused to allow the Plaintiff to testify or call witnesses, and initially gave the Plaintiff only 30 minutes to present his entire case. *See* July 19, 2016 Order (Exhibit 21). The Plaintiff concluded that he could not get a fair trial in D.C., so he negotiated a 120-day suspension and a $5,000.00 fine, followed by his resignation from the D.C. district court bar. *See* November 30, 2016 Order (Exhibit 22). It is worth nothing again that all of the issues underlying the D.C. suspension had been considered and rejected by the State Bar of Texas after the Plaintiff proved that the D.C. proceedings were tainted.

In December of 2016, the Plaintiff notified all bars wherein he is admitted (including the California Bar) about the suspension in D.C. *See, e.g.*, December 28, 2016 letter from Ty Clevenger to the California Bar (Exhibit 23), incorporating December 28, 2016 letter from Ty Clevenger to the Texas Board of Disciplinary Appeals (Exhibit 24). In his letters, the Plaintiff explained some of the irregularities in the D.C. proceedings, and he briefly described how he was denied a fair hearing in D.C. *Id*. The U.S. District Court for the Southern District of Texas (where the Plaintiff actually practices) indicated that it would not reciprocate the D.C. suspension since the State Bar of Texas had already addressed the matter. *See* April 14, 2017 Email from Claire Cassady to Ty Clevenger (Exhibit 25)("Due to the fact that the State Bar of Texas saw fit to reprimand and not suspend you, the Southern District of Texas will not take reciprocal action against you as a result of this disciplinary matter"). The U.S. Court of Appeals for the Fifth Circuit (where the Plaintiff also practices) refused to reciprocate the suspension since it was less than a year. *See* January 3, 2017 letter from Shelley Saltzman to Ty Clevenger (Exhibit 26). The U.S. Courts of Appeals for the Eighth and Tenth Circuits and the U.S. District

Courts for the Eastern and Western Districts of Texas, the Western District of Tennessee, and the Northern District of California have taken no action in response to the D.C. suspension. *See* Declaration of Ty Clevenger (Exhibit 1). After the California Bar notified the Plaintiff that it intended to seek his disbarment, the Plaintiff notified the bar that the jurisdictions where he is an *active* member (and actually practices law) have not reciprocated the D.C. discipline. *See* April 19, 2017 letter from Ty Clevenger to Judge Yvette Roland (Exhibit 27) and April 21, 2017 letter from Ty Clevenger to Judge Yvette Roland (Exhibit 28) (both of which were copied to Ms. Johns). Yet the California Bar still wants its pound of flesh.

As set forth above, the Plaintiff blogged about corruption in the State Bar of California in 2016 after he obtained proof that prosecutor Cydney Batchelor withheld exculpatory evidence in a case that she was prosecuting. On April 5, 2017, Defendant Johns sent a notice of intent to file disciplinary charges the Plaintiff on the basis of the Texas and D.C. adjudications. *See* April 5, 2017 Letter from Stacia Johns to Ty Clevenger (Exhibit 10). The Plaintiff requested an "early neutral evaluation conference" pursuant to the rules of the State Bar of California, and the Plaintiff conferred with Defendant Johns and State Bar Judge Roland via telephone on April 24, 2017. *See* Declaration of Ty Clevenger (Exhibit 1).

During that conference, the Plaintiff pointed out that the California Bar had known about the sanctions against the Plaintiff since 2013, *see, e.g.*, February 11, 2013 letter from Bill Stephens to Ty Clevenger (Exhibit 29), March 13, 2013 letter from Ty Clevenger to Bill Stephens (Exhibit 30), and September 16, 2014 letter from Ty Clevenger to Bill Stephens (Exhibit 31), the Texas bar had only reprimanded the Plaintiff,[3] and the jurisdictions where the Plaintiff actually practiced were not reciprocating the D.C. suspension. *See* Declaration of Ty Clevenger (Exhibit 1). Defendant Johns repeatedly said disbarment was necessary to "protect the

[3] The Texas bar was informed about all of the sanctions against the Plaintiff in D.C., *see* February 25, 2013 letter from Ty Clevenger to Dirrell S. Jones (Exhibit 18), and it declined to bring any charges in light of all the irregularities in the D.C. proceedings.

public," *id*., notwithstanding the fact that the Plaintiff is an inactive member and has not practiced in California for more than a decade. The Plaintiff informed Defendant Johns that some of the allegations in her draft complaint were provably false, and that (1) the D.C. Grievance Committee had been forced to back down from the same allegations against the Plaintiff and (2) those allegations were not part of the D.C. court's findings. *Id*. The latter is particularly significant because the entire California Bar case is predicated on the findings of the D.C. and Texas courts pursuant to CALIFORNIA BUSINESS & PROFESSIONS CODE §6049.1, *see* April 5, 2017 Letter from Stacia Johns to Ty Clevenger (Exhibit 10), but her draft pleadings do not match the findings of the D.C. court. *See* Draft complaint attached to April 19, 2017 letter from Stacia Johns to Judge Yvette Roland (Exhibit 32). Defendant Johns responded that she did not have access to the D.C. records because they were confidential, so the Plaintiff offered to waive confidentiality. *See* Declaration of Ty Clevenger (Exhibit 1).

The day after the conference, the Plaintiff wrote a letter to the U.S. District Court for the District of Columbia asking that the California Bar be granted access to all records related to the Plaintiff's disciplinary case. *See* April 25, 2017 letter from Ty Clevenger to Disciplinary Panel (Exhibit 33). A copy of that letter was provided to Defendant Johns by email. *See* Declaration of Ty Clevenger (Exhibit 1). On April 28, 2017, the Plaintiff emailed Defendant Johns and asked whether the California Bar would accept discipline similar to that in D.C., *i.e.*, a 120-day suspension followed by the Plaintiff's resignation from the California Bar. *See* April 28, 2017 email from Ty Clevenger to Stacia Johns (Exhibit 34).

On May 1, 2017, Defendant Johns wrote in an email that the California Bar would accept nothing less than the Plaintiff's disbarment. *See* May 1, 2017 email from Stacia Johns to Ty Clevenger (Exhibit 35). As of that date, Defendant Johns had not even seen the records from D.C., which would have shown that the D.C. court's findings do not match her allegations. (As noted above, that issue is absolutely critical, because her proferred claims arise under CALIFORNIA

BUSINESS & PROFESSIONS CODE §6049.1, which means the Bar can only impose discipline based on the findings of the other courts). Her insistence on exceeding the punishment imposed by Texas and D.C. – without even seeing the records from D.C. – effectively puts the lie to her claim that she seeks to disbar the Plaintiff in order to "protect the public." The California Bar was perfectly content with the reprimand imposed by Texas in 2014, but now that the Plaintiff has embarrassed the organization, it wants to disbar him.

Legal Standard

The standards for issuing a temporary restraining order and a preliminary injunction are "substantially identical." *Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.,* 240 F.3d 832, 839 n. 7 (9th Cir.2001).

> A preliminary injunction is an "extraordinary remedy." *Winter v. Natural Res. Def. Council, Inc.,* 555 U.S. 7, 129 S.Ct. 365, 375, 172 L.Ed.2d 249 (2008). The Ninth Circuit summarized the Supreme Court's recent clarification of the standard for granting preliminary injunctions in *Winter* as follows: "[a] plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Am. Trucking Ass'n, Inc. v. City of Los Angeles,* 559 F.3d 1046, 1052 (9th Cir.2009); *see also Cal Pharms. Ass'n v. Maxwell–Jolly,* 563 F.3d 847, 849 (9th Cir.2009) ("*Cal Pharm. I* "). Alternatively, " 'serious questions going to the merits' and a hardship balance that tips sharply toward the plaintiff can support issuance of an injunction, assuming the other two elements of the *Winter* test are also met." *Alliance for the Wild Rockies v. Cottrell,* 632 F.3d 1127, 1132 (9th Cir.2011). A "serious question" is one on which the movant "has a fair chance of success on the merits." *Sierra On–Line, Inc. v. Phoenix Software, Inc.,* 739 F.2d 1415, 1421 (9th Cir.1984).

Carrillo v. Schneider Logistics, Inc., 823 F. Supp. 2d 1040, 1042 (C.D. Cal. 2011).

Argument

The Plaintiff has established a prima facie case of First Amendment retaliation and selective prosecution. Although these concepts overlap, the strongest basis for equitable relief in this case is First Amendment retaliation. "Any form of official retaliation for exercising one's freedom of speech, including prosecution, threatened prosecution, bad faith investigation, and legal harassment, constitutes an infringement of that freedom." *Worrell v. Henry,* 219 F.3d 1197, 1212 (10th Cir. 2000). The Supreme Court has held that the "loss of First Amendment freedoms,

for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns,* 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976).

> "Official reprisal for protected speech 'offends the Constitution [because] it threatens to inhibit exercise of the protected right[';] ... the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out." *Hartman,* 547 U.S. at 256, 126 S.Ct. 1695 (first alteration in original) (citation omitted) (quoting *Crawford–El v. Britton,* 523 U.S. 574, 588 n. 10, 118 S.Ct. 1584, 140 L.Ed.2d 759 (1998)). We have held that "to demonstrate a First Amendment violation, a plaintiff must provide evidence showing that 'by his actions [the defendant] deterred or chilled [the plaintiff's] political speech and such deterrence was a substantial or motivating factor in [the defendant's] conduct.' " *Mendocino Envtl. Ctr. v. Mendocino Cnty.,* 192 F.3d 1283, 1300 (9th Cir.1999) (quoting *Sloman v. Tadlock,* 21 F.3d 1462, 1469 (9th Cir.1994)). Lacey need not show his "speech was actually inhibited or suppressed." *Id.* Rather, we consider "whether an official's acts would chill or silence a person of ordinary firmness from future First Amendment activities." *Id.* (quoting *917 *Crawford–El v. Britton,* 93 F.3d 813, 826 (D.C.Cir.1996), *vacated on other grounds,* 520 U.S. 1273, 117 S.Ct. 2451, 138 L.Ed.2d 210 (1997)). Lacey must allege facts ultimately enabling him to "prove the elements of retaliatory animus as the cause of injury," with causation being "understood to be but-for causation." *Hartman,* 547 U.S. at 260, 126 S.Ct. 1695...

Lacey v. Maricopa County, 693 F.3d 896, 916–17 (9th Cir. 2012). A federal court may enjoin a state-court prosecution where that prosecution is motivated by retaliatory animus or other bad faith:

> While the Ninth Circuit has not addressed this issue, the Fifth Circuit has held that "[a] showing of bad faith or harassment is equivalent to a showing of irreparable injury under *Younger,* and irreparable injury independent of the bad faith prosecution need not be established." *Fitzgerald v. Peek,* 636 F.2d 943, 944 (5th Cir.), *cert. denied,* 452 U.S. 916, 101 S.Ct. 3051, 69 L.Ed.2d 420 (1981). In that case, the court affirmed an injunction against a state court prosecution, holding that "[a] bad faith showing of this type will justify an injunction." *Id.* at 945; *see also Bishop v. State Bar of Texas,* 736 F.2d 292, 294 (5th Cir.1984) (holding that "irreparable injury under *Younger* is established by a sufficient showing of retaliatory or bad faith prosecution, and a federal injunction may issue" against a state bar association's disciplinary proceeding).

Privitera v. California Bd. of Med. Quality Assur., 926 F.2d 890, 898 (9th Cir. 1991).

> It is well established that a showing of bad faith prosecution presents a narrow exception to the doctrine of abstention which will justify federal interference in a pending state court criminal proceeding. *See Moore v. Sims*, 442 U.S. 415, 424, 99 S.Ct. 2371, 2377, 60 L.Ed.2d 994 (1979); *Huffman v. Pursue, Ltd*., 420 U.S. 592, 611, 95 S.Ct. 1200, 1211, 43 L.Ed.2d 482 (1975); *Younger v. Harris*, 401 U.S. 37, 49, 91 S.Ct. 746, 753, 27 L.Ed.2d 669 (1971); *Dombrowski v. Pfister*, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965); *Wilson v. Thompson*, 593 F.2d 1375, 1381 (5th Cir. 1979); *Shaw v. Garrison*, 467 F.2d 113, 119-22 (5th Cir.), *cert. denied*, 409 U.S. 1024, 93 S.Ct. 467, 34 L.Ed.2d 317 (1972); *Duncan v. Perez*, 445 F.2d at 560. A showing of bad faith or harassment is equivalent to a showing of irreparable injury under *Younger*, and irreparable injury independent of the bad faith prosecution need not be established. *Wilson v. Thompson*, 593 F.2d at 1381-82; *Shaw v. Garrison*, 467 F.2d at 120. Moreover, although multiple prosecutions of at least Mr. Fitzgerald were pending, the threat of multiple or repeated prosecutions is not necessary to

> establish bad faith prosecution. *Wilson v. Thompson*, 593 F.2d at 1381.
>
> Nor is it necessary for plaintiff to prove that the prosecution could not possibly result in a valid conviction. In *Wilson v. Thompson*, decided after the injunction involved herein was entered, this court enunciated a test which permits a state criminal proceeding to be enjoined if the plaintiff establishes that the conduct allegedly retaliated against or sought to be deterred is constitutionally protected and that the state's bringing of the criminal prosecution is motivated at least in part by a purpose to retaliate against or deter that conduct, and the state fails to show that it would have decided to prosecute even had the impermissible purpose not been considered. 593 F.2d at 1387. In this case, the evidence supports the finding that the prosecution was brought for the purposes of harassment and retaliation and would not have been brought but for the improper influence exerted on the prosecutor by certain DeKalb judges to seek the indictments. A bad faith showing of this type will justify an injunction regardless of whether valid convictions conceivably could be obtained.

Fitzgerald v. Peek, 636 F.2d 943, 944–45 (5th Cir. 1981). The Ninth Circuit may not have decided whether bad faith prosecution is an irreparable injury *per se* in all cases, but that is of no consequence here because the Supreme Court has decided that First Amendment injuries are indeed irreparable injuries *per se*. *See Elrod,* 427 U.S. At 373.[4] And the Defendants' effort to disbar an insolent blogger is precisely the type of activity that "would chill or silence a person of ordinary firmness from future First Amendment activities," *Lacey*, 693 F.3d at 916, therefore the burden shifts to the the California Bar to show "that it would have decided to prosecute even had the impermissible purpose not been considered." *Fitzgerald*, 636 F.2d at 945. In this case, preliminary relief poses no danger to the Defendants or the public, because the Plaintiff is inactive and does not practice in California.

The Bar will likely argue that various federal judges have said some awful things about the Plaintiff, therefore they have good reason to prosecute the Plaintiff. That, however, overlooks the fact that the Texas Bar dropped all charges but one after the Plaintiff demonstrated widespread misconduct and irregularities in the federal proceedings (including criminal

[4] The Plaintiff can also establish irreparable injuries as a factual matter. The Plaintiff has no practical chance of being admitted into the State Bar of New York (where he now lives) if he is prosecuted or disbarred in California. *See* Declaration of Ty Clevenger (Exhibit 1). Furthermore, the Plaintiff needs to obtain admission *pro hac vice* on behalf of a client in another state, but that will be virtually impossible of disciplinary charges are pending in California. *Id*.

misconduct by officers of the court).[5] The California Bar was made aware of the Texas disciplinary disposition in 2014, and it chose to take no further action, *i.e.*, it did not reciprocate the reprimand from Texas. *See* September 16, 2014 letter from Ty Clevenger to Bill Stephens (Exhibit 34). The Defendants could argue that the D.C. disciplinary case was an intervening event, but that would be nothing more than a pretext for retaliation. The D.C. disciplinary case was a rehash of the issues considered by Texas, and it was thoroughly tainted. *See* Motion to Dismiss (Exhibit 19) and Supplemental Motion to Dismiss (Exhibit 20). The federal court's grievance committee was forced to admit, for example, that it could not identify any prior case in which it had sought to disbar an attorney, except in cases of reciprocal discipline. *See* Declaration of Ty Clevenger (Exhibit 1). At the same time, that committee refused to investigate (much less prosecute) attorneys who were accused of criminal misconduct, *i.e.*, misconduct far more serious than anything alleged against the Plaintiff. *See* Motion to Dismiss (Exhibit 19) and Supplemental Motion to Dismiss (Exhibit 20). When the irregularities were made known to the federal courts where the Plaintiff actually practices, they refused to reciprocate the D.C. suspension. *See, e.g.,* April 14, 2017 Email from Claire Cassady to Ty Clevenger (Exhibit 25). Yet the California Bar wants to do more than reciprocate the D.C. punishment – it wants to go a step further and disbar the Plaintiff, even though he is an inactive member and does not practice in California. And the California Bar had already reached that decision without waiting to see the evidence from the D.C. disciplinary case. Only one thing can explain that level of animus: a desire to retaliate.

As a secondary basis for equitable relief, the Plaintiff has established a claim for selective prosecution. "In the Ninth Circuit, a selective prosecution defense requires a showing that (1)

[5] Around May 1, 2017, Dirrell S. Jones told the Plaintiff that he would "not make a good witness" for the California Bar because he had previously told California investigators about mitigating evidence, *i.e.*, that the pleadings that the Plaintiff had been sanctioned for turned out to be true. *See* Declaration of Ty Clevenger (Exhibit 1). If discovery is permitted, the Plaintiff will likely take Mr. Jones's deposition.

others generally are not prosecuted for the same conduct and (2) the decision to prosecute this defendant was based upon impermissible grounds such as race, religion or exercise of constitutional rights. *United States v. Alisal Water Corp.*, 114 F. Supp. 2d 927, 936 (N.D. Cal. 2000) citing *Church of Scientology v. Commissioner of Internal Revenue,* 823 F.2d 1310, 1321 (9th Cir.1987). Among all of the accusations lodged against the Plaintiff, nobody ever accused the Plaintiff of committing a crime. Yet the California Bar's own Cydney Batchelor did commit a crime when she conspired to withhold (and did withhold) exculpatory evidence. *See* CALIFORNIA BUSINESS & PROFESSIONS CODE §6128 and 18 U.S.C. § 242. The California Bar would not even investigate her, much less prosecute her, but it seeks to disbar the Plaintiff. If discovery is permitted, the Plaintiff will show that other politically-connected attorneys have engaged in misconduct that is far more serious than anything that the Plaintiff is accused of doing, yet the California Bar protected those attorneys. The Plaintiff will further show that the California Bar has never sought to disbar an inactive member on the basis of lesser punishments imposed by other jurisdictions where the attorney actually practiced (and where the alleged misconduct actually occurred).

Conclusion

The Defendants are prosecuting the Plaintiff because he embarrassed them on his blog (and because they need to generate revenue). They have whitewashed the misconduct of attorneys whom they favor, yet they seek to disbar an attorney who criticizes their cronyism and corruption. The Defendants are violating the Plaintiff's First Amendment rights to speak freely and petition for redress of grievances as well as his Fifth and Fourteenth Amendment rights to equal protection, therefore they should be temporarily restrained from prosecuting the Plaintiff until they can provide proof that they would have prosecuted the Plaintiff notwithstanding his Constitutionally-protected activities. *Fitzgerald*, 636 F.2d at 945. The Plaintiff requests that the Court schedule a hearing on his request for a preliminary injunction.

Respectfully submitted,

/s/ Ty Clevenger

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document was delivered via email to the individuals below on May 15, 2017. The exhibits were delivered via a link to Dropbox.com that was sent separately by email.

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